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CLERK

Supreme Court of the United States.

OCTOBER TERM, 1930.

Nos. 323, 65, 400, 412.

SECOND NATIONAL BANK OF SAGINAW, TRUSTEE, *Petitioner.* *v.* THE UNITED STATES.	No. 323. *On Writ of Certiorari to the Court of Claims.*
PERCIVAL E. MAGEE, *Petitioner,* *v.* THE UNITED STATES.	No. 65. *On Writ of Certiorari to the Court of Claims.*
MASCOT OIL COMPANY, INC., *Petitioner,* *v.* THE UNITED STATES.	No. 400. *On Writ of Certiorari to the Court of Claims.*
ROY & TITCOMB, INC., *Petitioner,* *v.* THE UNITED STATES.	No. 412. *On Writ of Certiorari to the Court of Claims.*

PETITION FOR REHEARING.

THEODORE B. BENSON,
Washington, D. C.
Counsel for Petitioners.

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PETITION FOR REHEARING.

Comes now the above named petitioners, and present this, their petition for a rehearing of the above entitled causes, and, in support thereof, respectfully show:

With reference to the contention of the petitioners that to the extent that it conflicts therewith Section 611 of the Revenue Act of 1928 has been repealed by Section 3, of the Act of

May 29, 1928, c. 901, 45 Stat. 986, 996, the Chief Justice in the course of his opinion, in the case of R. E. Graham and E. E. Foster, Copartners doing business under the firm name of Millie Francis Oil Company, Petitioners, *v.* Goodcell et al, No. 36, followed in these cases, concludes:

1. There is no repugnancy between the provisions of the new law and those of the old.
2. The two laws were passed not only at the same session but on the same day.
3. Section 611 establishes a special rule.

The petitioners respectfully submit that Section 611 as construed by this Court is in direct conflict with and there is a positive repugnancy between its provisions and those of Section 3, of the Act of May 29, 1928, c. 901. In support of their position the petitioners beg to point out that under the provisions of Section 611 they are not entitled to recover while under the provisions of Section 3 of the later act they would be entitled to recover in the absence of the conflicting provisions in Section 611. The petitioners submit that the two statutes, the one giving the right to recover and the other denying it, furnish a clear example of a positive repugnancy.

In the course of the opinion the Chief Justice states that the two acts were passed not only at the same session but on the same day and that the hour of approval of the Act of May 29, 1928, does not appear. That Congress intended Section 3, of the Act of May 29, 1928, to prevail over anything to the contrary in Section 611 and to have full and complete force and operation for the payment of all refunds certified by the Commissioners and of all judgments of the courts, clearly appears from the subsequent Appropriation Bills in which special reference is made to Section 3, of the Act of May 29, 1928. This subsequent recognition by Congress should dispel any doubt as to its intent that Section 3 of the Act of May 29, 1928, should be the prevailing law and should be in full force and operation.

The Appropriation Bills approved December 20, 1928 (45 Stat. 1035) and May 15, 1930 (46 Stat. 342) provide for the re-

funding of taxes illegally collected—not for the refunding of overpayments—and in each specific reference is made to Section 3, of the Act of May 29, 1928. The latest act of Congress and in which is couched the most recent intent reads as applicable here:

> "Refunding taxes illegally or erroneously collected: For refunding taxes illegally or erroneously collected as provided by law, * * * *Provided*, That a report shall be made to Congress * * * as required by section 3 of the Act of May 29, 1928, * * *."

The petitioners submit that on three separate occasions, all subsequent to the enactment of Section 611, Congress has recognized the right of a taxpayer to the refund of all taxes illegally collected from him.

It is the position of the petitioners that the only *authority* possessed by the Commissioner of Internal Revenue to make a refund or by the courts to entertain a suit for the recovery of a tax is that conferred by Section 3, of the Act of May 29, 1928, Section 3220 of the Revised Statutes, and that no refund can be made pursuant to the provisions of Section 607 of the Revenue Act of 1928.

Counsel for petitioners has never taken the position that Section 607 and Section 611 apply to the authority of the Commissioner in any different manner from which they apply to the courts. It is true that such position was possibly taken by other petitioners but counsel has consistently maintained that authority for the refund of a tax or the payment of a judgment of a court is that contained in Section 3220 of the Revised Statutes, as clearly recognized by Congress in subsequent Appropriation Bills. Counsel has never taken the position that the authority of the Commissioner to make a refund or the jurisdiction of the courts to render judgment for a refund are in any wise different.

The conclusion of the Court that Section 611 establishes a special rule for a particular situation is in effect that Section 611 is special and that Section 3, of the Act of May 29, 1928, c. 901, general and that the special legislation prevails over the general on the theory that Section 611 is an exception to the

general statute. The petitioners, however, desire to call attention to the fact that Congress enacted Section 611 as an exception to Section 607 and not as an exception to Section 3220 of the Revised Statutes as amended by Section 3, of the Act of May 29, 1928. The conclusion reached by the Court is therefore in effect that a tax can not be refunded or sued for under Section 3220 of the Revised Statutes but under Section 607 of the Revenue Act of 1928. This the petitioners submit conflicts with the clear intent of Congress as expressed in Section 3, of the Act of May 29, 1928, c. 901, and in the subsequent Appropriation Bills.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgments of the Court of Claims be, upon further consideration, reversed.

Respectfully submitted,

THEODORE B. BENSON,
Washington, D. C.
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I, Theodore B. Benson, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of these causes is presented in good faith and not for delay.

THEODORE B. BENSON,
Counsel for Petitioners.